

**WORKERS' COMPENSATION ADVISORY COUNCIL**

**MINUTES ~ ~MARCH 2, 2001 MEETING [9:00 A.M.]  
HOUSE HEARING ROOM 30  
LEGISLATIVE PLAZA  
NASHVILLE, TENNESSEE**

The meeting was called to order by Mr. Steve Adams, State Treasurer

Voting members in attendance:

Mr. Jack Gatlin  
Mr. Dave Goetz  
Mr. James G. Neeley  
Mr. Bob Pitts  
Mr. Othal Smith, Jr. [by proxy to Mr. Neeley]  
Mr. Steven Turner [by proxy to Mr. Goetz]

Nonvoting members in attendance:

Ms. Jacqueline Dixon  
Mr. Tony Farmer  
Ms. Abbie Hudgens

Ex officio members in attendance:

Commissioner Michael E. Magill, Department of Labor and Workforce Development  
Amy Arnold [Designee for Commissioner Anne Pope, Department of Commerce  
and Insurance]

Also present:

M. Linda Hughes, Executive Director  
Mr. Dale Sims  
Ms. Sue Ann Head, Administrator-Division of Workers' Compensation

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Mr. Adams called the meeting to order.

## NEW BUSINESS

### A. CONSIDERATION OF PENDING WORKERS' COMPENSATION LEGISLATION

The Advisory Council met to review proposed workers' compensation legislation. Sponsors of legislation were invited to attend and to discuss their bills. Other interested parties, including sponsors of legislation, were also given an opportunity to present positions on the bills.

The following bills were discussed and recommendations made by the Advisory Council:  
*[Note: A brief summary of the bill and its practical effect are included to make the action of the Advisory Council more understandable. In addition, the bills were discussed in random order - the minutes group the bills in ascending order by Senate bill number.]*

1. **SB 0277 by Haynes HB 0786 by Briley** [SB277/HB771 deletes the words "or total and permanent loss of mental faculties" from Subsection (ff) of the scheduled injuries section which would qualify an employee who suffers the total and permanent loss of mental faculties to benefits for a "body as a whole" injury and eligible to receive permanent total disability benefits until the age of full social security retirement benefits entitlement.]

### **Advisory Council on Workers' Compensation Comment**

#### ***Comments of Non-Voting Members:***

*TTLA Attorney Representative:* Mr. Tony Farmer noted the bills would have the practical effect of removing these injuries from the schedule and as a result they would be subject to the caps applicable to body as a whole injuries depending on whether the employee returns to work for the pre-injury employer. He believes this should result in significant reduction in costs of cases involving mental injuries. He feels removing these catastrophic injuries from the schedule has a valid effect. To think a quadriplegic employee is entitled to less benefits than a worker who sustains a back injury is not fair. He also noted current law provides protection for an employer to reduce the amount of benefits in the event the employee returns to gainful employment. If the benefits are being paid periodically, either party can petition the court for a change in benefits. (Mr. Goetz noted lump sums should be banned when an employee has been awarded permanent total disability benefits and Mr. Farmer stated in his opinion it is a rare occasion in which a lump sum is truly in the best interest of the injured worker.)

#### ***Comments of Voting Members:***

*Employee Representatives:* Mr. Jim Neeley stated it is apparent the manner by which the law treats workers who become mentally disabled cannot be justified when a person who is totally incapacitated mentally receives only 6-7 years of benefits and after that time fall prey upon society.

*Employer Representatives:* Mr. Pitts noted the business community could probably get comfortable with the provisions of the broader bill which includes double amputees, paralysis, etc., but they have concerns regarding the bills which relate to “mental faculties”. However, he would like time to determine how surrounding sister states handle the “mental faculties” cases as the business community wants to make sure the “mental faculties” portion of the proposed bills will apply to those cases in which the employees are truly deserving of receiving compensation and they don’t create unanticipated consequences which result in case law which will have a detrimental effect on the business community. He noted a desire to sit down with the interested groups to see if a middle ground can be found to meet everybody’s goals.

Mr. Goetz noted the bills do not distinguish between types of mental injuries. According to information he gathered, it appears of the states surrounding Tennessee, only North Carolina, and perhaps Mississippi to some extent, allows a pure mental case. Tennessee appears to be unique among the states with which it competes in business. He is concerned that by simply deleting these injuries from the section, questions remain unanswered. For example, the bills make no distinction between a cognitive loss which could be a result of a physical injury and an emotional case from which many people can recover. Also, there is no provision for an annual re-certification of continued permanent total disability accompanied by income statements, as there should be for all permanent total disability cases. He stated no one believes an employee who suffers a double amputation should not receive permanent total disability. In addition, he indicated the business community wants to understand whether the intent of the bill is to address injuries short of “total loss”. He felt the business community has more questions as to the practical effect of the proposed legislation than they were able to answer to this point in time.

### ***RECOMMENDATION of the Advisory Council [Voting Members]***

The voting members were **equally divided on this bill, as drafted**. The employee representatives recommended passage of the bill. The employer representatives recommended against passage of the bill. The Advisory Council noted it would be willing to consider any amendment to the bill which is forwarded to it for further comment.

2. **SB 0447 by Crutchfield HB 1648 by Turner (Shelby)** [SB477/HB1648 deletes the language and punctuation “or total and permanent loss of mental faculties,” from subdivision (ff). The deletion of this language from the scheduled injuries will qualify an employee who suffers the total and permanent loss of mental faculties to benefits for a “body as a whole” injury. This would make the individual eligible to receive permanent total disability benefits until the age of full social security retirement benefits entitlement.]

### **Advisory Council on Workers’ Compensation Comment**

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*Employer Representatives:* Mr. Pitts noted the business community could probably get comfortable with the provisions of the broader bill which includes double amputees, paralysis, etc., but they have concerns regarding the bills which relate to "mental faculties". However, he would like time to determine how surrounding sister states handle the "mental faculties" cases as the business community wants to make sure the "mental faculties" portion of the proposed bills will apply to those cases in which the employees are truly deserving of receiving compensation and they don't create unanticipated consequences which result in case law which will have a detrimental effect on the business community. He noted a desire to sit down with the interested groups to see if a middle ground can be found to meet everybody's goals.

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***RECOMMENDATION of the Advisory Council [Voting Members]***

The voting members were **equally divided on this bill**. The employee representatives recommended passage of the bill. The employer representatives recommended against passage of the bill.

3. **\*SB 1406 by Haynes      HB 1641 by Turner (Shelby)** [SB1406/HB1641 deletes subsections (r)[complete loss of hearing in both ears] and (ff) from the schedule of compensation contained in *TCA* §50-6-207(3)(A)(ii). The deletion of these injuries from the “schedule” would make them “body as a whole” injuries.]

***Advisory Council on Workers' Compensation Comment******Comments of Non-Voting Members:***

*TTLA Attorney Representative:* Mr. Tony Farmer noted the bills would have the practical effect of removing these injuries from the schedule and as a result they would be subject to the caps applicable to body as a whole injuries depending on whether the employee returns to work for the pre-injury employer. He believes this should result in significant reduction in costs of cases involving mental injuries. He feels removing these catastrophic injuries from the schedule has a valid effect. To think a quadriplegic employee is entitled to less benefits than a worker who sustains a back injury is not fair. He also noted current law provides protection for an employer to reduce the amount of benefits in the event the employee returns to gainful employment. If the benefits are being paid periodically, either party can petition the court for a change in benefits. (Mr. Goetz noted lump sums should be banned when an employee has been awarded permanent total disability benefits and Mr. Farmer stated in his opinion it is a rare occasion in which a lump sum is truly in the best interest of the injured worker.)

*Insurance Companies Representative:* At the request of Mr. Jerry Mayo, Mr. David Broemel presented the position of the American Insurance Association. He stated his organization supported passage of SB1406/HB1641 as “a step toward eliminating the schedule in its entirety”.

***Comments of Voting Members:***

*Employee Representatives:* Mr. Jim Neeley stated it is apparent the manner by which the law treats workers who become mentally disabled cannot be justified when a person who is totally incapacitated mentally receives only 6-7 years of benefits and after that time fall prey upon society.

*Employer Representatives:* Mr. Pitts noted the business community could probably get comfortable with the provisions of the broader bill which includes double amputees, paralysis, etc., but they have concerns regarding the bills which relate to “mental faculties”. However, he would like time to

determine how surrounding sister states handle the “mental faculties” cases as the business community wants to make sure the “mental faculties” portion of the proposed bills will apply to those cases in which the employees are truly deserving of receiving compensation and they don’t create unanticipated consequences which result in case law which will have a detrimental effect on the business community. He noted a desire to sit down with the interested groups to see if a middle ground can be found to meet everybody’s goals.

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#### ***RECOMMENDATION of the Advisory Council [Voting Members]***

The voting members were **equally divided on this bill**. The employee representatives recommended passage of the bill. The employer representatives recommended against passage of the bill.

4. **\*SB 1397 by Haynes      HB 1645 by Turner (Shelby)** [SB1397/HB1645 adds the language “or permanent mental disorder or condition resulting in permanent disability” after the wording “permanent physical disability” in the Second Injury Fund statute. The addition of this language will provide coverage by the Second Injury Fund when the employee has previously sustained a permanent mental disorder or condition and subsequently becomes totally disabled as a result of a work-related injury.]

#### **Advisory Council on Workers’ Compensation Comment**

##### ***Comments of Non-Voting Members:***

*Insurance Companies Representative:* At the request of Mr. Mayo, Mr. David Broemel presented the position of the American Insurance Association. His organization opposes the bill as it expands the Second Injury Fund to include mental disorders and they do not want to expand the Second Injury

Fund. Rather, they want to eliminate it. The bill gives employers an incentive to socialize their losses.

***Comments of Voting Members:***

*Employer Representatives:* Mr. Goetz noted, prior discussion of mental injuries notwithstanding this bill does address the intent of the Second Injury Fund - to encourage hiring of disabled workers.

***RECOMMENDATION of the Advisory Council [Voting Members]***

The Advisory Council **unanimously recommended passage** of the bill.

5. **SB 1398 by Haynes      HB 1642 by Turner (Shelby)** [SB1398/HB1642 increases the number of weeks of permanent partial benefits due for total loss of an upper extremity or a lower extremity to 300 weeks and changes the wording of the statute from “arm” to “upper extremity” and the word “leg” to “lower extremity”].

***Advisory Council on Workers' Compensation Comment***

***Comments of Non-Voting Members:***

*TTLA Attorney Representative:* Mr. Tony Farmer pointed out part of the problem is that doctors give an impairment to an upper extremity and Tennessee does not have a schedule which includes the “upper extremity”. So, now some lawyers are arguing a shoulder injury becomes a body as whole injury because it is not in the schedule, although the impairment rating is to a scheduled injury. The problem is that the AMA Guides do not fit Tennessee law in this area. The practical effect is the inconsistent judgments although case law requires a shoulder injury to be treated as a body as a whole injury. He pointed out when a doctor’s impairment to the upper extremity is changed under Tennessee’s schedule to an arm injury is comparing apples and oranges.

***Comments of Voting Members:***

*Employee Representatives:* Mr. Jim Neeley recommended the bill be referred to the standing committees for the sponsor to clarify the intent.

*Employer Representatives:* Mr. Goetz noted Tennessee employers currently pay significantly more for carpal tunnel injuries than in surrounding states and anything which increases this further will have a terrible effect on employers. Mr. Goetz noted under the proposal any injury less than total loss would be a 50% increase over prior benefits for the same injury.

Mr. Pitts noted there are two separate issues: The first relates to bringing the State into the AMA Guides structure and the second relates to the change in the amount of benefits to which that injury is entitled. Mr. Pitts viewed it as an increase from 200 weeks to 300 weeks. (Mr. Farmer noted it could be considered as a reduction from 400 weeks to 300 weeks.) Mr. Pitts pointed out this is where this matter gets very confusing as it does not apply only to total loss of the appendage but all injuries to the appendage. Mr. Pitts noted there should be consultation with the sponsor to try to reach an accommodation which is sensible.

***RECOMMENDATION of the Advisory Council [Voting Members]***

The voting members were **unsure of the intent of the bill. Therefore, the Advisory Council made no recommendation on the bill.**

6.     **\*SB 0634 by Clabough           HB 1216 by Head** [SB634/HB1216 provides an employer/insurer will be allowed a credit for payment of temporary total disability benefits in excess of 125 weeks.]

***Advisory Council on Workers' Compensation Comment***

***Comments of Non-Voting Members:***

*TTLA Attorney Representative:* Mr. Tony Farmer stated this bill penalizes the most seriously injured workers by offsetting their permanent benefits by temporary benefits exceeding 125 weeks. The two categories that would be affected are those who are severely injured or those who go through extensive rehabilitation. The catastrophically injured never draw temporary total disability benefits for any significant period of time. Therefore, this bill primarily affects those people who go through extensive rehabilitation by reducing their permanent disability benefits.

Mr. Farmer also noted (during the discussion of the particular employer Mr. Goetz discussed) the employer may or may not have been aware of an alternative when a treating doctor refuses to conclude the employee has reached maximum medical improvement. Even though the treatment is from an authorized physician, the employer may require the employee to submit to an independent medical examination and if the IME examiner concludes the employee is at maximum medical improvement, the dispute can be resolved by a court. The MMI issue can be addressed by a court.

*Insurance Companies Representative:* Mr. Broemel noted the American Insurance Association support the bill as it increases the incentive for return to work.



***Comments of Voting Members:***

*Employee Representatives:* Mr. Jim Neeley noted the bottom line for this bill is an intent to cut benefits. Mr. Jack Gatlin noted light duty may not always be available for the employee to return to work for the employer.

*Employer Representatives:* Mr. Goetz stated it was not the intent of the bill to affect permanent total cases and some amendments might be necessary. He explained the intent of the bill was to address a problem experienced by an employer which had an employee who was off work for 4 years and receiving temporary total disability benefits as a result of a dispute with the treating physician concerning the MMI date. That employer felt, after a reasonable period of time, they should receive some credit.

***RECOMMENDATION of the Advisory Council [Voting Members]***

The voting members were **equally divided on this bill**. The employee representatives recommended against passage of the bill. The employer representatives recommended passage of the bill.

7.     **\*SB 0636 by Clabough     HB 1215 by Head** [SB636/HB1215 would remove the provision which mandates that the lump sum must equal the value of all future installments. Substituted would be a sentence which will require the commuted lump sum to be paid at present value, computed at 10% true discount compounded annually.]

***RECOMMENDATION of the Advisory Council [Voting Members]***

The voting members were **equally divided on this bill**. The employee representatives recommended against passage of the bill. The employer representatives recommended passage of the bill.

8.     **\*SB 0309 by Dixon     HB 0510 by Buck** [SB309/HB510 adds a new subsection to TCA §50-6-209(b) that creates an additional workers' compensation death benefit. For those employees whose deaths are determined to have resulted from a TOSHA violation, the applicable death benefit would be tripled.]

**#8, Cont.*****RECOMMENDATION of the Advisory Council [Voting Members]***

The voting members were **equally divided on this bill**. The employee representatives recommended passage of the bill. The employer representatives recommended against passage of the bill.

9. **\*SB 0340 by Cooper HB 0820 by McMillan** [SB340/HB820 would increase the maximum weekly benefit for injuries occurring on or after July 1, 1999. The maximum weekly benefit would be 66 2/3% of the employee's average weekly wage, up to 110% of the SAWW.]

***Advisory Council on Workers' Compensation Comment******Comments of Voting Members:***

*Employee Representatives:* Mr. Jim Neeley noted this is a bill he had introduced in the last session and has introduced the bill again because they have a number of workers under contract whose wages exceed \$23 dollars an hour and when you try to achieve 66 2/3 of their earnings they cannot achieve this. This is an attempt to rectify a problem in the system. There is no intent to make this bill retroactive, there was a drafting error in the bill.

*Employer Representatives:* Mr. Goetz pointed out Tennessee's maximum weekly benefit is already higher than every state around us, except North Carolina, which is the only one which is at 110% of the state's average weekly wage. This bill would make Tennessee uncompetitive with states such as Georgia which has a maximum benefit of \$350 per week.

***RECOMMENDATION of the Advisory Council [Voting Members]***

The voting members were **equally divided on this bill**. The employee representatives recommended passage of the bill. The employer representatives recommended against passage of the bill.

10. **\*SB 0337 by Cooper HB 0853 by Cole (Dyer)** [SB337/HB853 would amend the case management section (*TCA* §50-6-123) and the medical treatment section (*TCA* §50-6-204) of the Workers' Compensation Law to add provisions stating that medical care, treatment, therapy or services provided pursuant to the Workers' Compensation Law shall not be considered home health services as defined in *TCA* §68-11-201(15).]

**Advisory Council on Workers' Compensation Comment*****Comments of Voting Members:***

*Employer Representatives:* Mr. Goetz reported he is working on an amendment with Mr. Dan Elrod, representative of the home care industry.

***RECOMMENDATION of the Advisory Council [Voting Members]***

The Advisory Council **made no recommendation on this bill** at the meeting as revision was anticipated following additional consultation with the home care industry.

11.    **\*SB 0355 by Cooper    HB 1092 by West** [SB355/HB1092 provides that, in addition to the list of three “physicians and surgeons” provided by the employer, the injured employee is also entitled to choose any “physician or surgeon” who participates in the TennCare program to be the employee’s “attending physician.” The TennCare physician must agree to accept as reimbursement from the employer or insurer the same reimbursement as the physician or surgeon would receive from TennCare. SB355/HB1092 would expand the choices of an attending physician which would be available to an injured employee. The employer would still be required to provide a panel of three physicians; however, the employee would not be limited to that list. The employee’s choices would be expanded to include any physician or surgeon who participates in the TennCare program. The TennCare physician must agree, however, to accept the TennCare reimbursement amount from the employer/insurer as full reimbursement for treatment of the workers’ compensation injury.]

***RECOMMENDATION of the Advisory Council [Voting Members]***

The voting members were **equally divided on this bill**. The employee representatives recommended passage of the bill. The employer representatives recommended against passage of the bill.

12.    **\*SB 0635 by Clabough    HB 1214 by Head** [SB635/HB1214 would delete the language “not associated together in practice” from *TCA* §50-6-204(a)(4). The proposed bill would allow an employer to provide a panel choice to the employee comprised of three doctors who practice together as partners or co-employees. The bill, as drafted, would leave the words “if available in the community” in the statute.]

**Advisory Council on Workers' Compensation Comment*****Comments of Non-Voting Members:***

*TTLA Attorney Representative:* Mr. Tony Farmer explained consolidation of several of the larger orthopedic groups has resulted in problems with this provision in East Tennessee. The judges have taken the position that if the physicians do not practice at the same location, although they are operating under the same general umbrella, they do not meet the definition of "not associated together in practice". He expressed what one wants to guard against is having the same three orthopedic specialists in the same office being the panel every time. He stated he did not think the risk of removing the language from the statute is warranted at this time.

***Comments of Voting Members:***

*Employee Representatives:* Mr. Jim Neeley recalled this provision was added to the law because the employee was not being given a true panel choice when the doctors were in association with each other. The provision was enacted to avoid this problem. Mr. Neeley agreed there may be a problem currently with orthopedic specialists. However, he stated he could not support the removal of the language "not associated together" from the statute, but was willing to discuss the problem related to orthopedic specialists.

*Employer Representatives:* Mr. Goetz noted there has been such consolidation in the past few years that it is very difficult, particularly with specialists, to comply with the requirement they not be associated together. This provision also prevents the use of managed care in workers' compensation in Tennessee, which has been effective in other states.

***RECOMMENDATION of the Advisory Council [Voting Members]***

The voting members were **equally divided on this bill**. The employee representatives recommended against passage of the bill. The employer representatives recommended passage of the bill.

- 13. SB 0138 by Cooper \*HB 0130 by Odom** [SB138/HB130 extends the sunset date of Public Chapter 990 (enacted in 2000), which requires an employer to provide an employee who suffers a back injury with a panel of four medical providers, one of whom must be a chiropractor to July 1, 2003.]

***RECOMMENDATION of the Advisory Council [Voting Members]***

The Advisory Council **unanimously recommended passage** of the bill **provided the bill was**

**amended to accomplish the following:**

- (1) The report by the Advisory Council should be concerning the law's effect on the entire workers' compensation system, not the workers' compensation assigned risk pool.**
- (2) The report by the Treasurer should be concerning the law's effect on the workers' compensation program for state employees, not the workers' compensation assigned risk pool.**
- (3) Both of the reports should be due on the same date.**
- (4) The due dates for the reports should be prior to the legislative session preceding the July 1, 2003 sunset date. The Advisory Council would suggest a due date of: December 15, 2002.**

- 14. \*SB 1404 by Haynes HB 1644 by Turner (Shelby)** [SB1404/HB1644 adds a new provision to the notice statute which will apply to those injuries which are caused by gradual or cumulative events or trauma as opposed to an accident. An employee who suffers a gradual injury must give notice within 30 days after the employee knew or should have known she suffered a work-related injury that has resulted in permanent physical impairment **or** within 30 days of the date when the employee is unable to continue working as a result of the injury and the employee knows, or should have known, the injury was caused by work activities.]

**Advisory Council on Workers' Compensation Comment*****Comments of Non-Voting Members:***

*TTLA Attorney Representative:* Mr. Tony Farmer informed the Advisory Council the proposed bill does not change current case law as the proposal has been the holding of the courts since 1928.

***Comments of Voting Members:***

*Employee Representatives:* Mr. Jim Neeley remarked the workers' compensation law is to be liberally construed.

*Employer Representatives:* Mr. Dave Goetz noted the courts do not currently enforce the notice provisions currently in the statute.

***RECOMMENDATION of the Advisory Council [Voting Members]***

The voting members were **equally divided on this bill**. The employee representatives recommended passage of the bill. The employer representatives recommended against passage of the bill.

15. **\*SB 1405 by Haynes HB 1643 by Turner (Shelby)** [SB1405/HB1634 would permit an employee to petition a court to order an employer to commence payment of temporary total disability or to commence reasonable and necessary medical benefits.]

**Advisory Council on Workers' Compensation Comment**

***Comments of Non-Voting Members:***

*TTLA Attorney Representative:* Mr. Tony Farmer remarked as a practical matter many courts currently believe they have the inherent authority to order the commencement of benefits and have been doing so for 25 years. He sees the bill as a recognition of the fact that if the law gives a court the power to recommence benefits, the court should also have authority to commence benefits. Mr. Farmer also noted when benefits have been denied, the attorney for the employee is not allowed to see the information provided by the employer/insurer and is sometimes the reason for the denial is not given.

*Insurance Companies Representative:* Mr. David Broemel stated the American Insurance Association opposes this bill.

***Comments of Voting Members:***

*Employee Representatives:* Mr. Jim Neeley stated he did not foresee attorneys proceeding to court if the employee's are receiving their benefits. He suggested a procedure be developed to allow the specialists who are attorneys to take an Order, with which the employer/insurer has not complied, to a court for mandatory enforcement of the Order.

*Employer Representatives:* Mr. Pitts expressed concern that the passage of this bill would destroy the entire administrative system which was enacted to enable a workers' compensation specialist to order payment of benefits. This authority was included in the administrative as an incentive to the parties to utilize the workers' compensation specialist system. In his opinion, passage of this bill will allow the parties to completely bypass the administrative system by simply proceeding directly to court. Mr. Goetz suggested a specialist should be given the power to take their order to a court for enforcement of the order. Both Mr. Goetz and Mr. Pitts agreed a solution needed to be found to the problems articulated regarding order enforcement and agreed the Department should have the authority to enforce their orders, if needed. Mr. Pitts also remarked the current possible penalties through the Department of Commerce and Insurance should continue in the law.

***RECOMMENDATION of the Advisory Council [Voting Members]***

The Advisory Council **unanimously recommended passage** of the bill ***provided the bill was amended to grant the Department of Labor and Workforce Development the authority to establish a procedure which will allow the Department to petition a Court for enforcement of a Specialist's order regarding workers' compensation benefits. The Court's enforcement of the order should be mandatory, not discretionary.***

16. **\*SB 1497 by Rochelle HB 1815 by Fitzhugh** [SB1497/HB1815 amends Revised UCC Article 9, enacted last year and effective this July 1, to make workers' compensation benefits unassignable.]

***RECOMMENDATION of the Advisory Council [Voting Members]***

The Advisory Council **unanimously recommended passage** of the bill.

17. **AMENDMENT TO \*SB 1436 by Person HB 0894 by Buck** [The proposed Amendment to SB1436 deletes the words "at least two (2) of whom shall be members of the supreme court or retired judges," from the final sentence of *TCA* §50-6-225(e)(3) and substitutes instead the words "at least one (1) of whom shall be a member of the supreme court." The language of the statute then would read: "This panel may consist of three (3) judges designated by the chief justice, at least one (1) of whom shall be a member of the supreme court."]

***RECOMMENDATION of the Advisory Council [Voting Members]***

The Advisory Council **unanimously recommended passage of the bill with the proposed amendment requested by the Administrative Office of the Courts.**

18. **\*SB 0446 by Crutchfield HB 1647 by Turner (Shelby)** [SB446/HB1647 would grant the trial judge the discretion to determine the reasonableness of costs associated with production of medical records in workers' compensation cases, provided the charges do not exceed \$1000.]

***RECOMMENDATION of the Advisory Council [Voting Members]***

The Advisory Council **unanimously recommended against** passage of the bill because of potential problems identified by Advisory Council staff.

19. **\*SB 0448 by Crutchfield HB 1646 by Turner (Shelby)** [SB448/HB646 would grant the trial judge the discretion to determine the reasonableness of costs associated with production of medical records in workers' compensation cases.]

**#19, Cont.*****RECOMMENDATION of the Advisory Council [Voting Members]***

The Advisory Council **unanimously recommended against** passage of the bill as a result of problems identified by Advisory Council staff.

20.    **\*SB 0273 by Haynes    HB 0771 by Briley** [SB273/HB771 requires the employee and the employer or the employer's insurer to provide that a person with authority to settle the dispute attend the benefit review conference. Failure by the employer or insurer to do so, without good cause, shall subject them to the same penalty as provided for failure to comply with a Specialist's order. That penalty is \$50.00 per day of noncompliance, not to exceed \$5000.]

***Advisory Council on Workers' Compensation Comment******Comments of Non-Voting Members:***

*TTLA Attorney Representative:* Mr. Tony Farmer stated in his opinion fines will not enhance the success of a mediation. He also noted most insurers have different tiers of settlement authority which are vested in different people. The principle behind mediation is to have the decision makers there to observe the claimant and to hear the arguments and with attendance by telephone all this is lost. Most of the time, by mediation date, the insurer/employer has decided what they are willing to pay. Feels the bill will not realistically change the effectiveness of mediation.

*Municipal Government Representative:* Ms. Abbie Hudgens questioned whether the amount of the suggested penalty would be sufficient to deter actions of the insurer/employer relating to insufficient authority to settle. She questioned whether it would be cheaper to pay the penalty rather than send someone to Tennessee to attend the mediation conference.

*Insurance Companies Representative:* Mr. David Broemel, representative of the American Insurance Association, stated they oppose the bill as micro-managing of the claims process.

***Comments of Voting Members:***

*Employee Representatives:* Mr. Jim Neeley stated when the mediation program was adopted the insurance industry supported this program and he did not understand why attendance was a problem. Mr. Neeley suggested the penalty include payment of the employee's attorney fee if the insurer/employer failed to have settlement authority at the mediation conference.



***RECOMMENDATION of the Advisory Council [Voting Members]***

The Advisory Council **unanimously recommended passage** of the bill **and additionally suggested** the Senate Commerce, Labor and Agriculture Committee, the House Consumer and Employee Affairs Committee and the Joint Committee on Workers' Compensation further examine the penalties assessed by the bill to determine if the penalties provisions of the act should be enhanced or strengthened.

21.     **\*SB 1482 by Davis, L.     HB 0897 by Buck** [SB1482/ HB897 deletes *TCA* §50-6-206(c)(4) in its entirety; however, the substituted language does not change the statute substantively. The bill would allow the Department two additional business days within which the Commissioner/designee must approve or reject the settlements submitted to the Department for approval.]

***RECOMMENDATION of the Advisory Council [Voting Members]***

The voting members **unanimously recommended passage** of the bill.

22.     **\*SB 0392 by Graves     HB 0743 by West** [SB392/HB743 requires before any proposed settlement is considered final, it must have the signed approval of the Administrator of the Division of Workers' Compensation.]

***Advisory Council on Workers' Compensation Comment******Comments of Non-Voting Members:***

*Insurance Companies Representative:* Mr. David Broemel stated the American Insurance Association opposes the bill because *TCA* §50-6-206 already contains a comprehensive settlement approval process.

***Comments of Voting Members:***

*Employee Representatives:* Mr. Jim Neeley stated there was an error made in the drafting of the bill, as the intent was that the Administrator approve Second Injury Fund settlements, not all settlements.

A discussion then ensued concerning the manner by which Second Injury Fund cases are settled, as this has been an issue in which the Advisory Council has had interest for approximately 1 ½ years.

**RECOMMENDATION of the Advisory Council [Voting Members]**

The Advisory Council **unanimously recommended passage** of the bill **provided** it was amended as follows:

1. Limit the application of the bill to second injury fund settlements only; **and**
  2. Provide that authority to settle second injury fund cases shall be delegated to the Commissioner of Labor and Workforce Development or his designee, the amount of settlement authority to be agreed upon by the attorney general and reporter, the comptroller of the treasury, the governor and the Commissioner, without the necessity of complying with §20-13-103.
23. **\*SB 1403 by Haynes HB 1084 by West** [SB1403/HB1084 requires an employer who participates in a “Drug-Free Workplace Program” to notify the parents or legal guardians of a minor of any drug or alcohol test results.]

**Advisory Council on Workers' Compensation Comment*****Comments of Voting Members:***

*Employee Representatives:* Mr. Jim Neeley stated if minors are using drugs their parents need to know it. Mr. Neeley suggested, in response to Mr. Pitts' concerns regarding barriers to participation in the program, that if an employer is committed to the Drug-Free Program, this bill will not be a deterrent.

*Employer Representatives:* Mr. Pitts stated he supported the concept that parents could not deal responsibly with their children if they do not know what is going on. However, he cautioned that care should be given to avoid creation of a potential barrier to participation in the Drug-Free Workplace Program.

**RECOMMENDATION of the Advisory Council [Voting Members]**

The Advisory Council **recommended passage** [five votes for passage; one abstention] of the bill.

24. **\*SB 1190 by Clabough HB 0854 by Cole (Dyer)** [SB1190/HB854 adds a new section to TCA §50-6-226(a)(1) to require all attorneys report annually to the Division of Workers' Compensation the following information when fees and expenses, in the aggregate, exceed \$10,000: summary of fees earned; summary of expenses incurred; hourly rates charged; hours worked; nature of expenses incurred; and total amounts of the awards actually received by claimants in each case.]

**Advisory Council on Workers' Compensation Comment*****Comments of Non-Voting Members:***

*Attorney Representative:* Ms. Jackie Dixon noted it is likely the Tennessee Bar Association will oppose this bill, as drafted.

***RECOMMENDATION of the Advisory Council [Voting Members]***

The voting members were **equally divided on this bill**. The employee representatives recommended against passage of the bill. The employer representatives recommended passage of the bill.

- 25. \*SB 0846 by McNally HB 1002 by Phelan** [SB846/HB1002 would raise the monetary threshold of *TCA* §50-6-204(a)(3) from \$5,000 to \$10,000 to require the insurer to file written notice with the Division of Workers' Compensation when it appears the medical benefits will reach a specific monetary amount.]

***RECOMMENDATION of the Advisory Council [Voting Members]***

The Advisory Council **unanimously recommended passage** of the bill.

- 26. SB 0665 by Jackson \*HB 0022 by Odom** [SB665/HB22 would clarify *TCA* §50-6-407(a) by adding the word "calendar" between the words "thirty (30) and "days" - the time within which the Commissioner of Labor and Workforce Development is allowed to revoke a "Certificate of Compliance".]

***RECOMMENDATION of the Advisory Council [Voting Members]***

The Advisory Council **unanimously took no position on the bill as it appeared to be a caption bill**.

- 27. \*SB 0801 by Kyle HB 1491 by McMillan** [SB801/HB1491 would add two additional practices of insurance companies as unfair or deceptive acts. They involve the calculation

of a workers' compensation premium by (1) surcharging or applying a debit additional premium unless the employer refused to comply with written safety recommendations within a reasonable length of time **or** (2) refusing to accept a non-election of coverage by subcontractor form that is filed with the Department of Labor.]

### **Advisory Council on Workers' Compensation Comment**

#### ***Comments of Non-Voting Members:***

*Insurance Companies Representative:* Mr. David Broemel, speaking on behalf of the American Insurance Association, stated the insurance industry is opposed to the bill as insurers have significant problems when dealing with the contractor/subcontractor issue. He stated the bill will create a chilling effect on an insurance company's ability to underwrite and price their risk properly. He also noted the workers' compensation division should have authority over this, not the Department of Commerce and Insurance.

Mr. Tom Redel spoke on behalf of Aon Risk Services, the administrator of the Tennessee Assigned Risk Pool. Mr. Redel agreed with the comments of Mr. Broemel. He also indicated the Assigned Risk Pool is opposed to the bill, because the I-18 is often a contentious form especially when there are questions whether the sub-contractor is truly an independent contractor or whether they are an employee who has been coerced into signing the I-18 form. He explained the worst case scenario is the case in which a person who has signed the I-18 form and waived rights to benefits, suffers a significant injury, seeks benefits in court and prevails. In this situation, the insurance carrier has not received a premium for the exposure and the employee has been forced to jump through hoops to secure the benefits to which the employee was entitled. Aon concurs that insurers would be less willing to voluntarily insure employers which utilize the I-18 form and this would result in an increase in the Assigned Risk Pool.

### ***RECOMMENDATION of the Advisory Council [Voting Members]***

The Advisory Council **unanimously recommended against** passage of the bill, **as written**.

- 28.    \*SB 1126 by Herron   HB 1763 by Sands** [SB1126/HB1763 adds an additional section to TCA §38-6-102(d) requiring the expansion of the fraud investigation unit to include investigation of insurance fraud referred to it by the Department of Commerce and Insurance, a District Attorney General, a law enforcement agency or the insurance department of another state.]

**#28, Cont.*****RECOMMENDATION of the Advisory Council [Voting Members]***

The three **Employee Representatives recommended passage of the bill.** The three **Employer Representatives abstained (passed).** The vote was, therefore, 3-0-3.

- 29.     \*SB 0036 by Harper     HB 0941 by Kernell** [SB36/HB941 provides a sunset date for the Advisory Council: June 30, 2004.]

***RECOMMENDATION of the Advisory Council [Voting Members]***

The Advisory Council **unanimously recommended passage** of the bill.

- 30.     \*SB 0113 by   HB 1074 by Kernell** [SB113/HB1074 provides a sunset date of June 30, 2004 for the Medical Care and Cost Containment Committee.]

***RECOMMENDATION of the Advisory Council [Voting Members]***

The Advisory Council **unanimously recommended passage** of the bill.

- 31.     SB 1188 by Clabough     \*HB 0619 by Kisber** [SB1188/HB619 extends the sunset date of the joint committee to June 30, 2007 and extends the advisory prospective loss costs system until July 1, 2001.]

**ACTION TAKEN by the Advisory Council:** The Advisory Council deferred final discussion and recommendation regarding this bill to give the members additional time to consider written information solicited from the insurance industry and from the Department of Commerce and Insurance. The Advisory Council announced its intent to meet on Friday, March 9, 2001 to finalize its action regarding this bill.

B. DEPARTMENT OF COMMERCE AND INSURANCE PRESENTATION RE:

Mr. Benn Daley, Actuary with the Department of Commerce and Insurance, presented the Advisory Council with a list of all workers' compensation insurance carriers in Tennessee which showed what percentage of their business was workers' compensation. After a brief discussion of the Department's positions regarding the Tillinghast recommendations, the Advisory Council requested the Department and the Insurance Industry to prepare written comments regarding the Tillinghast recommendations and submit them to the Advisory Council prior to the next meeting.

The meeting was then adjourned until March 9, 2001.